

EXHIBIT 4

1 UNITED STATES DISTRICT COURT

2 EASTERN DISTRICT OF VIRGINIA

3 Alexandria Division

4

5 - - - - - +

6 RUSSELL BRAMMER,

7 Plaintiff,

8 vs.

9 VIOLENT HUES PRODUCTIONS, LLC,

10 Defendant.

11 - - - - - +

12 Alexandria, Virginia

13 Wednesday, April 4, 2018

14

15 Deposition of RUSSELL BRAMMER, a witness

16 herein, called for examination by counsel for

17 Defendant in the above-entitled matter, pursuant to

18 agreement, the witness being duly sworn by MICHELE E.

19 EDDY, RPR, CRR, a Notary Public in and for the

20 Commonwealth of Virginia, taken at the law offices of

21 Attorney Craig C. Reilly, 111 Oronoco Street,

22 Alexandria, Virginia, at 9:01 a.m.

09:26:10 1 that would be accurate. We cite an objection, we

09:26:14 2 cite the federal rule, and we move on.

09:26:17 3 MR. WEIR: Thank you, Your Honor.

09:26:18 4 That's all I have for you, and, again, sorry for

09:26:21 5 taking your time this morning.

09:26:23 6 JUDGE DAVIS: No problem. That's why I

09:26:25 7 get paid that exorbitant fee that I get paid as a

09:26:30 8 poor government employee.

09:26:31 9 MR. WEIR: Thank you again for your

09:26:33 10 time, Your Honor. Hopefully we don't have to

09:26:35 11 speak with you again today, as pleasant at it is.

09:26:38 12 JUDGE DAVIS: Okay. No problem.

09:26:39 13 MR. WEIR: Take care.

09:26:40 14 JUDGE DAVIS: All right.

09:26:41 15 (Telephone call ended.)

09:26:52 16 BY MR. WEIR:

09:26:53 17 Q Okay, Mr. Brammer, is it your

09:26:55 18 recollection that you uploaded this photo to your

09:26:58 19 personal website prior to uploading it to the

09:27:01 20 Flickr site?

09:27:02 21 A I don't remember.

09:27:04 22 Q And with respect to -- I believe you

09:27:06 1 also mentioned that you had uploaded it as well to
09:27:08 2 your Facebook page. Is that correct?

09:27:12 3 A Yes.

09:27:12 4 Q Do you recall whether that was prior to
09:27:15 5 uploading it to Flickr or not?

09:27:17 6 A I don't remember.

09:27:22 7 Q Now, this photo in particular, had
09:27:24 8 you -- had you shown any -- had you made any
09:27:28 9 prints of it for anyone, had you sold any copies
09:27:31 10 of it, anything like that, prior to uploading it
09:27:33 11 to Flickr?

09:27:49 12 A There was an instance, but I'm not sure
09:27:51 13 when it happened. I don't know if it was prior or
09:27:55 14 after.

09:27:56 15 Q Okay. What were the -- was that a sale
09:27:58 16 of the photo?

09:27:59 17 A Yes. It was -- a copy of it was hanging
09:28:04 18 in my wife's office, and someone saw it and asked
09:28:07 19 about it.

09:28:08 20 Q And your wife's office would be the
09:28:11 21 Stroga -- is that how it's pronounced? -- the
09:28:13 22 Stroga Yoga studios?

09:51:53 1 MR. DEAL: At this point I am going to
09:51:54 2 object because if we're -- this is a photograph
09:51:58 3 that you generated when? I mean, if we have a --
09:52:03 4 I think just more appropriate, if you're going to
09:52:06 5 ask the question I think you're going to ask, the
09:52:08 6 more appropriate one would be to use the post
09:52:10 7 included in the complaint. My objection is going
09:52:14 8 to be on relevance to Defendant's Exhibit 1, it
09:52:21 9 being something that was generated, you know, this
09:52:23 10 morning or a week ago.

09:52:25 11 So my objection is that --

09:52:27 12 MR. WEIR: Your objection --

09:52:28 13 MR. DEAL: -- is that --

09:52:28 14 MR. WEIR: Your objection is noted.

09:52:28 15 BY MR. WEIR:

09:52:29 16 Q Mr. Brammer, do you see anything on this
09:52:31 17 photograph here indicating on the photograph
09:52:34 18 itself that the picture is copyrighted?

09:52:36 19 A No.

09:52:37 20 Q Do you see anything on the photograph
09:52:38 21 itself here indicating the title of the work?

09:52:43 22 A On the photograph itself, no.

09:52:44 1 Q On the photograph itself.

09:52:45 2 A No.

09:52:46 3 Q Do you see anything on the photograph
09:52:47 4 itself indicating that you are the author of the
09:52:50 5 photograph?

09:52:55 6 A I mean, other than that -- my knowledge
09:52:57 7 of the photograph, no, there's nothing on the --
09:53:01 8 it's not signed, no.

09:53:05 9 Q Is there anything on the photograph
09:53:06 10 itself here indicating the terms and conditions
09:53:09 11 for use of the photograph?

09:53:12 12 A No.

09:53:14 13 Q Is there any indication on the
09:53:15 14 photograph itself where such terms and conditions
09:53:18 15 may be found?

09:53:19 16 A No.

09:53:21 17 Q To the best of your recollection, has
09:53:23 18 this Adams Morgan at Night photograph ever
09:53:26 19 contained any of the information that we just
09:53:27 20 talked about?

09:53:33 21 A I don't believe so.

09:53:34 22 Q So if someone was to copy this picture

09:56:03 1 photograph to the Defendant's commercial website,
09:56:06 2 www.novafilmfest.com.

09:56:11 3 Did I read that correctly?

09:56:12 4 A Yes.

09:56:18 5 Q Then if we skip down to paragraph 12, it

09:56:21 6 reads, "On September 30, 2016, Plaintiff

09:56:25 7 registered the copyrighted photograph with the

09:56:28 8 United States Copyright Office and received the

09:56:31 9 registration number VA 2-056-245."

09:56:39 10 Did I read that correctly?

09:56:41 11 A Yes.

09:56:43 12 Q So do you agree with me that you filed

09:56:45 13 for the copyright registration for this photo

09:56:48 14 after the infringement began?

09:56:53 15 A Yes.

09:56:56 16 Q Did you file for your copyright after

09:56:58 17 you saw your photograph posted on the NOVA Film

09:57:01 18 Fest website?

09:57:11 19 A I believe so. I believe I did it --

09:57:16 20 yes, I believe so.

09:57:21 21 Q And so the -- seeing your photograph

09:57:23 22 posted on the NOVA Film Fest website was the

11:06:02 1 say, "Usage fees broken down for six-month

11:06:06 2 period."

11:06:07 3 Do you see that?

11:06:08 4 A Uh-hmm.

11:06:08 5 Q If we go to the next page, you say,

11:06:13 6 "Quarter page for a rotating display." Then in

11:06:18 7 parens you list the websites. Then you have a

11:06:21 8 colon and then "\$200 per image use."

11:06:24 9 Did I read that correctly?

11:06:25 10 A Yes.

11:06:28 11 Q So, essentially, what -- what you are

11:06:30 12 saying here is that the \$200 that you had quoted

11:06:33 13 previously is for each specific website. Right?

11:06:38 14 A For a six-month period, yes.

11:06:40 15 Q Right.

11:06:41 16 So to get the overall for all six

11:06:44 17 websites, you would just multiply that 200 by 6,

11:06:47 18 by the amount of uses? Is that fair?

11:06:50 19 A I believe that's a fair reading of it,

11:06:52 20 yes.

11:07:01 21 Q And this six months that you are

11:07:03 22 referencing in the top part of page 4 of DX 10,

11:07:08 1 that is for the prior online usage of your photo,
11:07:14 2 prior to your reaching out to Ms. Haas. Is that
11:07:16 3 fair?

11:07:20 4 A I don't know if that's fair. It says,
11:07:26 5 "That covers the online use you've already accrued
11:07:31 6 from my work," so, yes.

11:07:40 7 Q So my -- I am correct that the \$200 for
11:07:44 8 six months was referring to the prior unlicensed
11:07:46 9 use of your photos. Right?

11:07:50 10 A Yes.

11:07:58 11 Q And then if you go to kind of after the
11:08:02 12 space, you say, "Per image breakdown as I've
11:08:05 13 identified they are being used." You say, "Adams
11:08:09 14 Morgan at Night, \$1,200 for six months or \$1,500
11:08:13 15 for a year."

11:08:15 16 Am I right there that you're talking
11:08:16 17 about -- since you give six months or a year, that
11:08:18 18 you're talking about potential future licensing?
11:08:20 19 Is that fair?

11:08:21 20 A Yes.

11:08:26 21 Q Then the next down line you say -- after
11:08:28 22 the space, I'm sorry -- you say, "For the physical

11:21:12 1 A Yes.

11:21:16 2 Q So of the \$1,250 for the Adams Morgan at

11:21:20 3 Night picture, did you -- did you attribute any

11:21:25 4 specific part of that to a single use on a single

11:21:28 5 website, for instance, the use on themelwood.com?

11:21:34 6 A I don't believe so.

11:21:35 7 Q So you never -- you never broke down

11:21:37 8 specifically what part of that 1,250 was for the

11:21:40 9 print versus website use or anything like that?

11:21:46 10 A You mean as far as the 2,500?

11:21:49 11 Q As far as the 1,250 for the Adams Morgan

11:21:53 12 at Night photograph.

11:21:54 13 A Oh, I'm sorry, yes. No, that wasn't

11:21:57 14 laid out specifically.

11:21:57 15 Q So you couldn't -- sitting here today,

11:22:01 16 you couldn't tell me what part of that 1,250 you

11:22:03 17 could specifically attribute to a single website

11:22:05 18 use such as the use on themelwood.com?

11:22:08 19 A No.

11:22:09 20 Q But we agree that it is -- the 1,250

11:22:13 21 encompasses both the use of the print and the use

11:22:16 22 on six websites and potentially more.

11:22:20 1 A Yes.

11:22:39 2 Q If we can go back to -- you can put the

11:22:42 3 Bernstein stuff to the side.

11:22:46 4 If we go back to DX 6, which is the

11:22:50 5 Answers to Interrogatories that has the list of

11:22:53 6 the various licenses on page 5.

11:22:57 7 Are you with me?

11:22:58 8 A Hold on.

11:22:59 9 Q Yes.

11:23:00 10 A DX 6, page 5, yes.

11:23:06 11 Q You see after letter f, it says,

11:23:07 12 "August 4, 2017, \$750, Pixsy, license."

11:23:15 13 Did I read that right?

11:23:16 14 A Yes.

11:23:16 15 Q We'll take a look at a few documents

11:23:19 16 related to that license.

11:23:36 17 (DX Exhibit 13 was marked for

11:23:36 18 identification and attached to the deposition

11:23:36 19 transcript.)

11:23:36 20 BY MR. WEIR:

11:23:39 21 Q Showing you a document I've marked as

11:23:41 22 DX 13.

14:17:32 1 A It's accurate as far as what that means
14:17:34 2 to me, yes.

14:17:35 3 Q And you have -- you have no reason to
14:17:37 4 believe that that is -- has somehow been
14:17:39 5 changed --

14:17:40 6 A No.

14:17:41 7 Q -- or is --

14:17:41 8 A No. Sorry.

14:18:06 9 Q All right. So if we go back to the
14:18:07 10 beginning of DX 22, I just want to quickly look at
14:18:11 11 the email at the top that's the July 17th -- I'm
14:18:14 12 sorry, July 13th, 2017, email from you to Pixsy.
14:18:17 13 Do you see that?

14:18:21 14 A Yes.

14:18:22 15 Q You write, "Hi, I wanted to update you
14:18:23 16 regarding the copyright status of this work. The
14:18:26 17 registration has finally come through. The number
14:18:27 18 is VA 2-056-245 effective September 30, 2016."

14:18:36 19 Did I read that correctly?

14:18:37 20 A Yes.

14:18:37 21 Q And so we can -- from this we can take
14:18:42 22 it that while you submitted your copyright on

14:18:44 1 November 30th, 2016, it came through maybe nine

14:18:49 2 months later, July 13th, 2017?

14:18:51 3 A Yes.

14:18:51 4 Q Okay.

14:19:02 5 THE WITNESS: Can we take a short break?

14:19:03 6 MR. WEIR: Yes, of course.

14:19:04 7 THE VIDEOGRAPHER: We are going off

14:19:05 8 record at 14:19.

14:19:07 9 (A brief recess was taken.)

14:25:03 10 THE VIDEOGRAPHER: We're on record at

14:25:04 11 14:25.

14:25:05 12 (DX Exhibit 23 was marked for

14:25:05 13 identification and attached to the deposition

14:25:05 14 transcript.)

14:25:06 15 BY MR. WEIR:

14:25:23 16 Q Mr. Brammer, I'm handing you what I've

14:25:26 17 marked as DX 23. It's an email chain. The top

14:25:31 18 email is an email from Pixsy Case Management Team

14:25:33 19 to you dated September 9th, 2017. Is that

14:25:37 20 correct?

14:25:40 21 A September 9th?

14:25:41 22 Q I'm sorry, September 8th, 2017.

14:48:56 1 A Well, I mean, I recognize it because I
14:48:58 2 created it and also it says "SmugMug" at the top.

14:49:08 3 Q So SmugMug, is that a similar site to
14:49:13 4 Flickr where a person can create an account and
14:49:15 5 upload their own photos to it? Is that fair?

14:49:21 6 A I mean, it is a place where you can
14:49:23 7 upload photos. It's used differently than Flickr.
14:49:28 8 It's where I -- it's -- or at least I use it
14:49:32 9 differently. It's where I sell prints to clients.
14:49:41 10 There's -- you know, so if a client -- I'll post
14:49:48 11 the gallery of their images on SmugMug, and they
14:49:52 12 can order prints off of it.

14:49:54 13 Q Got it. Okay.

14:49:57 14 Do you still use the SmugMug website?

14:50:02 15 A Yes, occasionally, yes. Well, yes, when
14:50:05 16 I post photos for clients, yes.

14:50:10 17 Q And you will see that you have your
14:50:12 18 Adams Morgan at Night photo uploaded to your
14:50:15 19 SmugMug page. Right?

14:50:17 20 A Yes. Yes, it's there.

14:50:20 21 Q So you'll notice that there are -- there
14:50:22 22 are three pages in DX 28. I'll represent to you

14:50:29 1 that the first two are screenshots from the
14:50:34 2 opening kind of what you go to when you type in
14:50:36 3 that address. The third one is when you click
14:50:39 4 specifically on the Adams Morgan at Night photo.
14:50:41 5 So it's -- my understanding is it's a link on the
14:50:44 6 SmugMug page. When you click it, this third page
14:50:47 7 is what it looks like when you click it.

14:50:50 8 A Okay.

14:50:50 9 Q Okay?

14:50:51 10 So on the opening SmugMug page -- that
14:50:55 11 would be what is represented on pages 1 and 2 of
14:50:58 12 DX 28 -- do you see any indication that the Adams
14:51:03 13 Morgan at Night photo or any other photos are
14:51:06 14 copyrighted?

14:51:15 15 A No, on the first two pages, I don't see
14:51:18 16 anything.

14:51:18 17 Q How about when you specifically click on
14:51:20 18 the Adams Morgan at Night photo, which is the
14:51:22 19 third page of DX 28, do you see any indication on
14:51:25 20 that page that would tell someone that the photo
14:51:27 21 was copyrighted?

14:51:32 22 A No, other than the little "Russell

14:51:34 1 Brammer" at the bottom. I'm not sure why that's

14:51:36 2 there.

14:51:36 3 Q So there's no indication.

14:51:38 4 A No, there's no copyright indication.

14:51:45 5 Q You can put that one to the side.

14:51:48 6 If we can dig into your pile of

14:51:50 7 documents there for DX 4. It is the complaint.

14:52:21 8 A They're all out of order.

14:52:23 9 Q That's all right. I gave you a lot of

14:52:25 10 documents.

14:52:56 11 A You said 4. Right?

14:52:59 12 Q 4, correct.

14:53:19 13 There it is.

14:53:20 14 A Yes, the complaint.

14:53:21 15 Q So could you go to page 8 of the

14:53:26 16 complaint.

14:53:38 17 If we're in the right place, that should

14:53:40 18 be another screenshot of your Flickr page. Right?

14:53:46 19 A Yes. Sorry, they're stuck together.

14:53:48 20 Q So this is the screenshot of your Flickr

14:53:51 21 page. This is the one that was attached to the

14:53:54 22 complaint that you filed in this case. Correct?

14:53:57 1 A Yes.

14:53:58 2 Q If you turn to the next page, there's

14:54:00 3 page 9. It says "Exhibit 3" at the top. Are you

14:54:09 4 with me? I think you had it. It should be right

14:54:11 5 after the page we just looked at.

14:54:13 6 A Oh, I'm sorry.

14:54:13 7 Q This one (indicating).

14:54:14 8 A Yes, got you.

14:54:18 9 Q So that is the use on novafilmfest.com

14:54:22 10 that you allege in this case infringed upon your

14:54:25 11 copyright. Correct?

14:54:26 12 A Yes.

14:54:26 13 Q You agree with me that the picture --

14:54:27 14 the version of the picture included here is not

14:54:33 15 100 percent of -- strike that.

14:54:36 16 You agree with me that the picture that

14:54:37 17 is here on page 9 of DX 4 is not the entirety of

14:54:41 18 the Adams Morgan at Night photo. Correct?

14:54:44 19 A Yes.

14:54:47 20 Q Is it fair to say it's been cropped to

14:54:49 21 something about 50 percent of the size? I know

14:54:52 22 you don't -- I'm not asking for scientific

14:54:55 1 certainty.

14:54:55 2 A Yes, that's about -- somewhere around

14:54:58 3 there.

14:55:03 4 Q If I could have you dig in the pile

14:55:06 5 again for DX 25. Hopefully that one is not too

14:55:10 6 buried.

14:55:10 7 A Do I need to keep 4 handy?

14:55:16 8 Q I don't think so.

14:55:17 9 A Okay. 25?

14:55:22 10 Q Correct.

14:55:22 11 A Found it right off. Okay.

14:55:23 12 Q And that is Plaintiff's Memorandum in

14:55:26 13 Opposition to Defendant's Motion to Dismiss

14:55:29 14 Plaintiff's complaint"?

14:55:30 15 A Yes.

14:55:31 16 Q Would you please turn again to page 9.

14:55:41 17 If you look at the second full

14:55:42 18 paragraph, the final sentence reads, "Brammer

14:55:46 19 posted the Copyrighted Photograph to his website,

14:55:50 20 along with many other photographs of his to

14:55:53 21 advertise his skills as a commercial

14:55:55 22 photographer."

14:55:56 1 Do you see that?

14:55:57 2 A Yes.

14:55:57 3 Q Is that true?

14:56:03 4 A Among other things, yes.

14:56:04 5 Q What other things are you referring to?

14:56:06 6 A Well, in addition to commercial

14:56:07 7 photography.

14:56:10 8 Q So the specific photograph was posted to

14:56:12 9 advertise your skills as a commercial

14:56:14 10 photographer. Right?

14:56:16 11 A Yes, that's fair to say.

14:56:19 12 Q And then -- I just want to be clear.

14:56:20 13 And it was posted to your website for other

14:56:22 14 reasons as well? Is that what you're saying?

14:56:24 15 A No. I'm saying that not all of the

14:56:28 16 photos that I posted are specifically about

14:56:31 17 commercial photography.

14:56:32 18 Q But the -- so the specific photograph at

14:56:34 19 issue in this case, so when it says, "Brammer

14:56:37 20 posted the Copyrighted Photograph," capital C,

14:56:41 21 capital P, it's referring to the photograph at

14:56:46 22 issue in this case.

14:56:48 1 Do you understand that?

14:56:48 2 A Yes.

14:56:49 3 Q And it says, "Brammer posted the

14:56:49 4 Copyrighted Photograph to his website" -- and then

14:56:49 5 we can skip the "along with many other

14:56:49 6 photographs" point -- "to advertise his skills as

14:56:52 7 a commercial photographer."

14:56:54 8 That is true, correct?

14:57:01 9 A I don't know -- I wouldn't say

14:57:02 10 necessarily specifically commercial photography

14:57:04 11 but just in general.

14:57:06 12 Q So to advertise your skills as a

14:57:08 13 photographer.

14:57:10 14 MR. DEAL: I'm going to object because

14:57:11 15 that's -- he's asked and answered you twice

14:57:14 16 already now.

14:57:14 17 Q You can answer my question.

14:57:16 18 A I have answered it.

14:57:18 19 Q So would it be fair to say "Brammer

14:57:21 20 posted the copyrighted photograph to his website

14:57:23 21 to advertise his skills as a photographer"?

14:57:25 22 MR. DEAL: Objection for the third time

14:57:27 1 for the same purposes.

14:57:28 2 Q You can answer.

14:57:32 3 A Yeah, in -- yes, and a subset of that

14:57:34 4 being commercial photography and -- yes.

14:57:42 5 Q Okay.

14:57:42 6 So if we turn to the next page of this

14:57:44 7 document, which is page 10, do you see the last

14:57:54 8 paragraph, the second sentence starts, "Like most

14:57:59 9 commercial photographers, Brammer earns the bulk

14:58:02 10 of his income in three ways: (1) charging clients

14:58:06 11 for his expertise and skill in capturing original

14:58:09 12 images. This includes a 'creative fee,' which

14:58:14 13 covers only the image capture while performing a

14:58:17 14 specific task for a client."

14:58:19 15 Did I read that correctly?

14:58:20 16 A Uh-hmm.

14:58:21 17 Q So is it fair --

14:58:23 18 A Yes. Thank you.

14:58:23 19 Q Is it fair to read that as describing a

14:58:27 20 situation where a client hires you to take

14:58:31 21 specific photographs for a specific event or a

14:58:36 22 specific type of shoot or something to that

15:02:19 1 third party's use of the Adams Morgan at Night

15:02:22 2 photograph?

15:02:26 3 A No, I don't think so.

15:02:27 4 Q Do you have -- strike that.

15:02:33 5 Do you publicly offer licenses for

15:02:37 6 third-party use for the Adams Morgan at Night

15:02:40 7 photograph anywhere, your website or otherwise?

15:02:42 8 A No, I don't think so.

15:02:46 9 Q Does the RussellBrammer.com website

15:02:49 10 offer to sell physical prints of the Adams Morgan

15:02:54 11 at Night website?

15:02:56 12 A Not at the moment, no.

15:02:58 13 Q Did it at some point?

15:03:00 14 A I believe it did.

15:03:02 15 Q Do you recall when that changed?

15:03:05 16 A When it changed? No, I don't remember.

15:03:09 17 I don't know.

15:03:14 18 Q Is there anywhere else, either on your

15:03:17 19 website or anywhere on the Internet or any gallery

15:03:20 20 or anything like that, where you do offer prints

15:03:23 21 of the Adams Morgan at Night photograph for sale

15:03:26 22 to the public?

15:03:30 1 A No, not that I can think of. Maybe you
15:03:33 2 could get it on the SmugMug page, but I don't
15:03:38 3 think so. I'm not sure.

15:03:41 4 Q Apart from potentially on the SmugMug
15:03:43 5 page, you can't think of any other places where
15:03:45 6 it's for sale to a third party?

15:03:48 7 A No, I don't think so.

15:03:52 8 Q So if a third party wanted to purchase a
15:03:55 9 print of the photograph or purchase a license to
15:03:59 10 use the photograph, they would have to
15:04:01 11 specifically find you and reach out to you in
15:04:04 12 order to do that. Right?

15:04:07 13 A Yes, I believe that's accurate.

15:04:17 14 MR. WEIR: Why don't we take a short
15:04:18 15 break. I think that's everything I have, but I
15:04:20 16 just want to go over my documents.

15:04:24 17 THE WITNESS: Sure.

15:04:25 18 THE VIDEOGRAPHER: Going off record,
15:04:26 19 15:04.

15:04:30 20 (A brief recess was taken.)

15:15:48 21 THE VIDEOGRAPHER: On the record at
15:15:49 22 15:15.